16B C.J.S. Constitutional Law § 1223

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PART VI. Privileges and Immunities; Equal Protection

XV. Privileges and Immunities of Citizens and Related Matters

C. Denial of Privileges and Immunities

1. Nonresidents and Foreign Corporations

§ 1223. Denial of privileges and immunities to nonresidents

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2935 to 2945, 2950, 2951, 2953 to 2959

The Federal Constitution prohibits discrimination by a state against citizens of other states based only on the fact of citizenship, but it does not preclude discrimination between citizens and noncitizens based on a valid independent reason.

The United States Constitution[1] prohibits discrimination by a state against citizens of other states based only on the fact of citizenship.[2] However, discrimination between citizens and noncitizens based on a valid independent reason is not precluded.[3] If the challenged restriction deprives a nonresident of a protected privilege or immunity, the restriction is invalid under the Privileges and Immunities Clause unless there is a substantial reason for the difference in treatment,[4] and the discrimination practiced against nonresidents bears a substantial relationship to the state's objective.[5]

A state may impose on nonresidents reasonable conditions of doing business in the state, especially when like conditions are imposed on its own citizens.[6] The State, in the exercise of its police power, may provide that only

residents of the state may be authorized to engage in the practice of certain professions or the conduct of certain kinds of business requiring special qualifications.[7] However, neither a state nor a municipality may discriminate against the right of individuals to pursue a lawful calling therein solely on the ground that they are nonresidents.[8] Nevertheless, privileges may on reasonable grounds be restricted to those persons acquainted with conditions in the state, as in some professions or occupations, although citizens of other states are indirectly discriminated against.[9]

In pursuance of its power to control the property of the State for the benefit of its own citizens, the State may forbid certain acts by nonresidents.[10] The fact that a state owns a resource does not, of itself, completely remove a residency law concerning such resource from the prohibition of the Privileges and Immunities Clause of the Federal Constitution.[11] Thus, it has been held that a state may not use its control over a resource to create an absolute employment preference for its own residents.[12]

Since the right to act as an executor[13] or administrator[14] is not a privilege or immunity of a citizen of the United States or of a state, it follows that a state may discriminate against nonresidents as to the appointment of persons to these positions. However, statutes excluding all nonresident persons from being trustees have been held unconstitutional.[15]

To prove substantial justification for a statute alleged to violate the Privileges and Immunities Clause, a state has the burden of proving there is a valid independent reason for the disparate treatment and that nonresidents are a peculiar source of evil at which the statute is aimed.[16] The Privileges and Immunities Clause requires nonresidents to be the peculiar source of evil rather than merely a contributor to problem.[17] Before a court hearing a Privileges and Immunities Clause challenge to a statute determines whether nonresidents constitute the peculiar evil, it first must find that evil was one in which statute is aimed.[18] Under the Privileges and Immunities Clause, there must be some evidence of the benefits of a residents-preference law in dealing with a problem created by nonresidents.[19]

In determining whether a residency-based restriction of an activity offends the privileges and immunities protections, the court undertakes a two-step inquiry; first, the activity in question must be sufficiently basic to the livelihood of the nation as to fall within the purview of the Privileges and Immunities Clause, and if the challenged restriction deprives nonresidents of a protected privilege, the restriction is invalidated only if it is not closely related to the advancement of a substantial state interest.[20] In addition, the court considers, among other things, whether a less restrictive means of regulation are available and must distinguish between incidental discrimination against nonresidents and discrimination that imposes too heavy a burden on their privileges.[21] State exclusion against nonresidents need not be absolute to be actionable under the Privileges and Immunities Clause.[22]

Any regulation or prohibition imposed on both residents and nonresidents cannot be held a denial or abridgment of the privileges or immunities of nonresidents although it may subject them to greater inconvenience or expense.[23] In other words, while the Privileges and Immunities Clause forbids a state from intentionally giving its own citizens a competitive advantage in business or employment, the Clause does not require that a state tailor its every action to avoid any incidental effect on out-of-state tradesmen.[24]

Marriage.

Statutes prohibiting contract of marriage or issuance of marriage licenses in cases involving nonresidents intending to continue living in jurisdiction in which the marriage would be void or otherwise prohibited did not violate Privileges and Immunities Clause; statute did not discriminate between residents and nonresidents but between

nonresidents whose marriages would be prohibited under the laws of their home states and nonresidents whose marriages would not be prohibited under the laws of their home states.[25]

CUMULATIVE SUPPLEMENT

Cases:

Courts employ a two-part test to determine whether disparate treatment violates the Privileges and Immunities Clause, under which, first, the activity in question must be sufficiently basic to the livelihood of the nation as to fall within the purview of the Clause, and, second, if the challenged restriction deprives non-residents of a protected privilege, courts will invalidate it only if they conclude that the restriction is not closely related to the advancement of a substantial state interest. U.S.C.A. Const. Art. 4, § 2, cl. 1. Marilley v. Bonham, 802 F.3d 958 (9th Cir. 2015).

Missouri's Liquor Control Law, which required residency to obtain retail license, did not violate Privileges and Immunities Clause by denying out-of-state professional wine merchant privilege to engage in his occupation in state upon same terms as Missouri citizens; merchant's right to pursue his occupation across state lines was not protected by Privileges and Immunities Clause, and merchant's occupation was subject to limitations imposed by Twenty-first Amendment. U.S. Const. art. 4, § 2, cl. 1; U.S. Const. Amend. 21; Mo. Ann. Stat. §§ 311.050, 311.060.1. Sarasota Wine Market, LLC v. Parson, 381 F. Supp. 3d 1094 (E.D. Mo. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S. Const. Art. IV, § 2, cl. 1.

2 U.S.—Hicklin v. Orbeck, 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978); Bethesda Lutheran Homes and Services, Inc. v. Leean, 122 F.3d 443 (7th Cir. 1997).
Iowa—Borden v. Selden, 259 Iowa 808, 146 N.W.2d 306 (1966).
N.J.—Rubin v. Glaser, 166 N.J. Super. 258, 399 A.2d 984 (App. Div. 1979), judgment aff'd, 83 N.J. 299, 416 A.2d 382 (1980).
Wyo.—Schakel v. State, 513 P.2d 412 (Wyo. 1973).

3 U.S.—Hicklin v. Orbeck, 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978); Tangier Sound Waterman's Ass'n v. Pruitt, 4 F.3d 264 (4th Cir. 1993).
Iowa—Borden v. Selden, 259 Iowa 808, 146 N.W.2d 306 (1966).
N.J.—Salorio v. Glaser, 82 N.J. 482, 414 A.2d 943 (1980).
Vitality of nation
It is only with respect to those privileges and immunities bearing upon the vitality of the nation as a single entity that the state must treat all citizens, resident and nonresident, equally.
U.S.—Salem Blue Collar Workers Ass'n v. City of Salem, 33 F.3d 265 (3d Cir. 1994).

4 U.S.—Barnard v. Thorstenn, 489 U.S. 546, 109 S. Ct. 1294, 103 L. Ed. 2d 559 (1989); Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985).

5 U.S.—Barnard v. Thorstenn, 489 U.S. 546, 109 S. Ct. 1294, 103 L. Ed. 2d 559 (1989); Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985).
Closely related to advancement of a substantial state interest
U.S.—Nelson v. Geringer, 295 F.3d 1082 (10th Cir. 2002).

6 Iowa—Davidson v. Henry L. Doherty & Co., 214 Iowa 739, 241 N.W. 700, 91 A.L.R. 1308 (1932).

7 Ky.—King v. Kentucky Board of Pharmacy, 160 Ky. 74, 169 S.W. 600 (1914).

8 U.S.—United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden, 465 U.S. 208, 104 S. Ct. 1020, 79 L. Ed. 2d 249 (1984).
Alaska—Noll v. Alaska Bar Ass'n, 649 P.2d 241 (Alaska 1982).
N.Y.—Gordon v. Committee on Character and Fitness, 48 N.Y.2d 266, 422 N.Y.S.2d 641, 397 N.E.2d 1309 (1979).
W. Va.—Sargus v. West Virginia Bd. of Law Examiners, 170 W. Va. 453, 294 S.E.2d 440 (1982).

9 Cal.—Quong Ham Wah Co., v. Industrial Acc. Commission of Cal., 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190 (1920).

10 Ark.—State v. Smith, 71 Ark. 478, 75 S.W. 1081 (1903).

11 U.S.—Hicklin v. Orbeck, 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978).

12 U.S.—United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden, 465 U.S. 208, 104 S. Ct. 1020, 79 L. Ed. 2d 249 (1984); Hicklin v. Orbeck, 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978); Pittsburgh Federation of Teachers Local 400, Am. Federation of Teachers, AFL-CIO v. Aaron, 417 F. Supp. 94 (W.D. Pa. 1976).
N.Y.—Salla v. Monroe County, 48 N.Y.2d 514, 423 N.Y.S.2d 878, 399 N.E.2d 909 (1979).

13 Ill.—In re Mulford, 217 Ill. 242, 75 N.E. 345 (1905).

14 Ill.—In re McWhirter's Estate, 235 Ill. 607, 85 N.E. 918 (1908).

15 U.S.—Shirk v. City of La Fayette, 52 F. 857 (C.C.D. Ind. 1892).

16 U.S.—A.L. Blades & Sons, Inc. v. Yerusalim, 121 F.3d 865 (3d Cir. 1997).

17 U.S.—A.L. Blades & Sons, Inc. v. Yerusalim, 121 F.3d 865 (3d Cir. 1997).

18 U.S.—A.L. Blades & Sons, Inc. v. Yerusalim, 121 F.3d 865 (3d Cir. 1997).

19 U.S.—W.C.M. Window Co., Inc. v. Bernardi, 730 F.2d 486 (7th Cir. 1984).

20 U.S.—Parnell v. Supreme Court of Appeals of West Virginia, 110 F.3d 1077 (4th Cir. 1997).
Ariz.—Big D Const. Corp. v. Court of Appeals for State of Ariz., Div. One, 163 Ariz. 560, 789 P.2d 1061, 89 A.L.R.4th 567 (1990).

Restrictions on new residents

Statute limiting new residents of state, for 12 months, to temporary assistance to needy families benefits they would have received in state of their prior residence was unconstitutional as violating Fourteenth Amendment right to travel; state's legitimate interest in saving money provided no justification for discrimination among equally eligible citizens, neither duration of recipients' current residence nor identity of their prior states of residence had any relevance to their need for benefits, and those factors did not bear any relationship to state's interest in making equitable allocation of funds to be distributed among its needy citizens.

U.S.—Saenz v. Roe, 526 U.S. 489, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999).

21 U.S.—Tolchin v. Supreme Court of the State of N.J., 111 F.3d 1099 (3d Cir. 1997).

22 U.S.—Sestric v. Clark, 765 F.2d 655 (7th Cir. 1985).

23 U.S.—Richter v. East St. Louis & S. Ry. Co., 20 F.2d 220 (E.D. Mo. 1927); Standard Computing Scale Co. v. Farrell, 242 F. 87 (S.D. N.Y. 1916), aff'd, 249 U.S. 571, 39 S. Ct. 380, 63 L. Ed. 780 (1919).
La.—Town of St. Martinville v. Dugas, 158 La. 262, 103 So. 761 (1925) (disapproved of on other grounds by, State v. Latil, 231 La. 551, 92 So. 2d 63 (1956)).

24 U.S.—McBurney v. Young, 133 S. Ct. 1709, 185 L. Ed. 2d 758 (2013); Tolchin v. Supreme Court of the State of N.J., 111 F.3d 1099 (3d Cir. 1997).

25 Mass.—Cote-Whitacre v. Department of Public Health, 446 Mass. 350, 844 N.E.2d 623 (2006).

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